

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

ORIGINAL

76-7125

To be argued by
THOMAS F. DALY

United States Court of Appeals
For the Second Circuit

GERALD LIPSKY, executor under the Will of WALDEN ROBERT
CASSOTTO (a/k/a BOBBY DARIN), deceased,
Plaintiff-Appellant,
against

COMMONWEALTH UNITED CORPORATION (now known as IOTA IN-
DUSTRIES, INC.); COMMONWEALTH UNITED MUSIC, INC.; THE
HUDSON BAY MUSIC COMPANY (formerly known as ALLEY-STREET
MUSIC VENTURE); ALLEY MUSIC CORPORATION; and STREET SONGS,
INC.,

Defendants-Appellees.

**On Appeal from the United States District Court
for the Southern District of New York**

**BRIEF FOR DEFENDANTS-APPELLEES THE
HUDSON BAY MUSIC COMPANY (formerly
known as ALLEY-STREET MUSIC VENTURE),
ALLEY MUSIC CORPORATION and
STREET SONGS, INC.**

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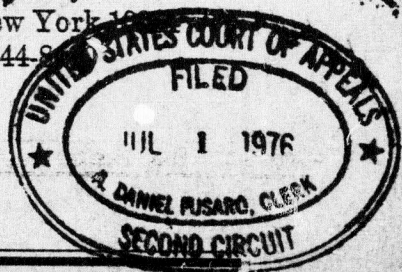


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Preliminary Statement

This is an appeal from a Final Order and Judgment dismissing plaintiff-appellant's Second Amended Unified Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted.

This brief is submitted on behalf of defendants-appellees, The Hudson Bay Music Company, Alley Music Cor-

poration and Street Songs, Inc. ("Hudson Bay defendants"). In the interest of brevity, the Hudson Bay defendants refer to and incorporate herein by reference the statement of the case, issues presented, facts and arguments set forth in the brief submitted to this Court by defendants-appellees, Iota Industries, Inc. (formerly Commonwealth United Corporation) ("CUC") and Commonwealth United Music, Inc. ("CUM"). The instant brief is limited to a consideration of the facts and law relating specifically to plaintiff-appellant's alleged cause of action against the Hudson Bay defendants.

STATEMENT OF ISSUE PRESENTED

In an action alleging breach of a contract for the transfer of shares of corporate *stock* and seeking restoration of the consideration transferred under said contract, is equitable relief in the form of rescission and restoration appropriate as against defendants who own none of the stock subject to transfer in said contract, who were not parties to said contract, who neither induced, participated in, nor had knowledge of a breach of said contract, and who possess only corporate *assets* which were acquired for a valuable consideration?

Statement of the Case

Plaintiff-appellant's Second Amended Unified Complaint alleges breach of a contract for the transfer of certain corporate stock, and seeks rescission and restoration of certain corporate assets, or, in the alternative, compensatory damages, an accounting, an injunction, and costs and disbursements, including reasonable attorneys' and accountants' fees. App. 161-171.*

Following Notices of Motion by all defendants (App. 172-174) to dismiss the Second Amended Unified Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a Final Order and Judgment was entered February 17, 1976, by the United States District Court for the Southern District of New York dismissing said complaint with prejudice and without costs. App. 196-200. In the course of ordering that "[t]he motions of all defendants herein . . . are granted in all respects" (App. 200), Judge McFadden specifically concluded as to the alleged cause of action against the Hudson Bay defendants:

"7. Even if plaintiff were entitled to equitable relief as demanded in the Second Amended Unified Complaint against defendants Iota and CUM, said complaint is fatally deficient as to all other defendants in that it fails to show any facts entitling plaintiff to the equitable relief demanded against said other defendants." (App. 200)

It is from this Final Order and Judgment that plaintiff has appealed.

* "App. —" refers to page citation in the Joint Appendix on file in this appeal.

Statement of Facts

The original complaint in this action was filed August 27, 1970, by plaintiff's decedent Walden Robert Cassotto, a/k/a Bobby Darin ("Darin"), in the United States District Court for the Central District of California. App. 5-62. Named as defendants were CUC, CUM, and certain individual officers and directors of CUC. App. 5-7. The complaint alleged causes of action for rescission, breach of contract, fraud, and securities violations, seeking *inter alia* rescission of an August 20, 1968, agreement between Darin and CUC/CUM and restoration of the consideration transferred under said agreement, compensatory and punitive damages. App. 5, 21. The complaint alleged that under the terms of said contract, "defendant CUM agreed to acquire from plaintiff all of the issued and outstanding shares of capital stock of T.M. [T.M. Music, Inc.] by issuing solely in exchange therefor shares of capital stock of defendant CUC . . ." App. 8, ¶13, lines 13-21; App. 22-23.* Thus, in seeking restoration of the consideration transferred under the contract (App. 21, lines 17-19) Darin was asserting a right to recover "all of the issued and outstanding *shares of capital stock* of T.M." (App. 8, ¶13, lines 15-16 (emphasis added)). Darin made no demand for the return of the T.M. corporate assets, sought no preliminary or injunctive relief barring the transfer of the T.M. assets, nor did the complaint (or the attached contract itself) ever define the T.M. assets as the consideration to be transferred by Darin under the contract.

* Exhibit A attached to the original complaint is a copy of the August 20, 1968 agreement. See App. 22-62.

By stipulation of all parties who had appeared, the action was transferred to the Southern District of New York for all purposes in November of 1972. App. 64.

On August 5, 1974, an Amended Unified Complaint was filed by Gerald Lipsky, Darin's executor,* adding the Hudson Bay defendants as parties to the action.** App. 71-98. Following the granting of all defendants' motions to strike certain allegations in the Amended Unified Complaint pursuant to Rule 12(f) of the Federal Rules of Civil Procedure (App. 99-113; App. 155-160),† plaintiff filed his Second Amended Unified Complaint on July 29, 1975. App 161.

The Second Amended Unified Complaint (App. 161-171) alleges that after the commencement of this action in 1970 CUC caused all of the assets of T.M. to be transferred to the Hudson Bay defendants. App. 168, ¶17. The complaint further alleges that at the time of such transfer the Hudson Bay defendants "knew of the pendency of this action and Darin's demand herein for rescission . . . of the contract

* Darin died on December 20, 1973.

** On November 16, 1973 the Hudson Bay defendants had accepted service of an "Amended Complaint" and "Supplemental Complaint," the latter pleading naming the Hudson Bay defendants as "Additional Defendants" in an action entitled *Walden Robert Cassotto a/k/a Bobby Darin v. Commonwealth United Corporation, et al.*, 70 Civ. 5030 (S.D.N.Y.). Prior to this the Hudson Bay defendants had been served on May 31, 1973 with a summons and complaint in an action commenced in the United States District Court for the Southern District of New York entitled *Walden Robert Cassotto v. Iota Industries, et al.*, Index No. 73 Civ. 2381. On motion by defendants Iota and CUM this latter action was dismissed by Order of the Court by the Hon. Frank H. McFadden on November 9, 1973, the Court granting plaintiff leave, *inter alia*, to add defendants to the prior pending action, *i.e.*, 70 Civ. 5030.

† Plaintiff is also appealing from the order granting defendants' Rule 12(f) motions, but the issues raised by that order are, it is submitted, irrelevant to the legal sufficiency of the claim asserted against the Hudson Bay defendants.

of August 20, 1968 and accordingly for restoration to Darin of the T.M. assets and of any rights accruing thereunder," and that in connection with such transfers, "CUC, CUM, Koppelman and others undertook to indemnify Hudson Bay, Alley Music and Street Songs against obligations or liabilities to Darin (including an award of the T.M. assets to Darin) arising out of or in connection with the contract of August 20, 1968." App. 168-169, ¶18.

As discussed *supra*, p. 4, the original 1970 complaint sought restoration of the consideration transferred by Darin under the August 20, 1968 agreement, i.e., "all of the issued and outstanding shares of capital stock of T.M." App. 21, lines 17-19; App. 8, ¶13, lines 13-21. The Second Amended Unified Complaint seeks rescission of the same August 20, 1968, contract (App. 170), "pursuant to which, in return for Darin's transfer of all outstanding shares of T.M. stock, . . . CUC became obligated to issue to Darin . . . shares of CUC common stock . . ." App. 163, ¶4.*

Although asserting a right to restoration of the T.M. assets from the Hudson Bay defendants (App. 170-171), plaintiff has failed to allege in either the original 1970 complaint, the Amended Unified Complaint, or the Second Amended Unified Complaint that: (i) the August 20, 1968, agreement between Darin and CUC/CUM was anything more than a contract for the transfer of shares of corporate stock; (ii) the Hudson Bay defendants own any of the stock transferred under said contract; (iii) the Hudson Bay defendants were parties to said contract, or induced, participated in, or had knowledge of a breach of said contract; or (iv) the Hudson Bay defendants paid less than a valuable consideration for the T.M. assets they acquired.

* A copy of the contract attached to the Second Amended Unified Complaint as Exhibit A likewise reveals that the parties contracted to transfer "TM Stock" for "CUC Stock." See App. 22, 23.

ARGUMENT

I

Plaintiff has failed to state a claim upon which relief can be granted.

As was indicated *supra*, the Hudson Bay defendants adopt and incorporate herein the statements and arguments as set forth in the brief submitted to this Court on behalf of the defendants-appellees, Commonwealth United Corporation ("CUC") (now known as Iota Industries, Inc.), and Commonwealth United Music, Inc. ("CUM") in support of the Final Order and Judgment dismissing with prejudice plaintiff's Second Amended Unified Complaint ("Complaint") for failure to state a claim upon which relief can be granted.

II

Assuming *arguendo* plaintiff has stated a claim as to defendants CUC and CUM, the Complaint fails to state a claim for rescission and restitution against the Hudson Bay defendants.

This is an action for a breach of contract which seeks rescission of a contract between Darin and the CUM defendants. There is no allegation that the Hudson Bay defendants were parties to that contract, or that they in any way participated in, induced or even had knowledge of the breach of that contract. It is submitted that the Complaint fails to state a claim for rescission and restitution against the Hudson Bay defendants.

As this Court recently observed in *Gordon v. Burr*, 506 F.2d 1080, 1083 (2d Cir. 1974), where an action for rescission is based on a contract theory, such as mistake or breach of contract, the remedy of rescission and restitution is available only against a wrongdoer who is a party to the contract with the victim of the wrongdoing. Thus, since the Complaint merely alleges a cause of action for breach of a contract to which the Hudson Bay defendants were not a party, the plaintiff clearly has no right of rescission or restitution against the Hudson Bay defendants. This conclusion is especially compelling since there is no allegation whatsoever that the Hudson Bay defendants participated in or induced the breach, or committed any wrongdoing whatsoever.

None of the authorities cited by the plaintiff at pages 27-30 of his brief supports the contention that he is entitled to rescission and restoration of the TM assets now owned by the Hudson Bay defendants. *Marr v. Tumulty*, 256 N.Y. 15, 175 N.E. 356 (1931), the only case cited by plaintiff in support of his contention, is clearly inapposite. *Marr* was an action to rescind a contract whereby the plaintiff through fraud and bribery was induced to exchange shares of stock of the Marr Oil Corporation for stock in the purchaser corporation, Southern States Oil Corporation. Among other things, it was argued that rescission and restitution of the Marr Oil Corporation stock to the plaintiff was precluded because the Marr stock was subsequently transferred to a third corporation, Gulf States Oil and Refining Corporation. The Court of Appeals rejected this argument on the ground that two officers of the Southern company who were parties to the fraud and bribery were also officers of the Gulf company and acted on its behalf. Hold-

ing that "what was notice to them was notice also to the company," the Court of Appeals stated that "rescission is not checked until the property to be reclaimed has passed into the ownership of a purchaser for value without notice of the wrong."

The *Marr* case is distinguishable from the instant case in three important respects: (1) the perpetrators of the fraud in the *Marr* case were officers of both the original transferee and the subsequent transferee, while no such community of interest or knowledge of the wrongdoing is alleged to exist here between the CUM defendants and the Hudson Bay defendants; and (2) the relief sought in the *Marr* case was restoration of the stock which was the consideration transferred in the fraudulent transaction, while the plaintiff in the instant case is not seeking restoration of the T.M. stock which Darin transferred in the agreement allegedly breached by the CUM defendants, but restoration of the T.M. assets which were subsequently acquired by the Hudson Bay defendants.

Similarly, none of the references to the Restatement of the Law of Restitution cited in the plaintiff's brief support his contention that he is entitled to rescission and restitution against the Hudson Bay defendants. It is a well established rule that restitution will not be granted as against a *bona fide* purchaser for value who takes without notice of facts giving rise to a constructive trust. Restatement of the Law of Restitution, §172 (1937). As described in the Restatement, the purpose of this rule is to create a convenient guideline for determining which of two innocent persons should bear a loss which must be borne by someone, and the principle applied by the courts of equity

is that they will not impose the loss upon a person who has innocently acquired title to property for value. Restatement of the Law of Restitution, *supra*, §172, Comment a.

Applying this rule to the facts of the instant case, it is clear that the plaintiff has not stated a claim against the Hudson Bay defendants for restitution of the T.M. assets. The plaintiff does not contend that the Hudson Bay defendants purchased the assets in question from the CUM defendants for anything but a fair and valuable consideration. Moreover, although the Complaint alleges that the Hudson Bay defendants acquired certain T.M. assets with knowledge of the pendency of an action seeking damages, rescission and restitution of the shares of stock sold by plaintiff, the Complaint does not allege that they were on notice of any facts giving rise to a constructive trust of assets acquired by the Hudson Bay defendants for a valuable consideration.

As set forth in the Restatement of the Law of Restitution, a constructive trust is imposed upon property where a party would be unjustly enriched if he were permitted to retain it (§160); where the owner of property transfers it as a result of a mistake entitling him to restitution (§§163-165); or where the owner of property transfers it, being induced by fraud, duress or undue influence of the transferee (Restatement, §§166-169). The instant Complaint naming the Hudson Bay defendants does not allege that the Hudson Bay defendants obtained the assets by fraud, duress, undue influence, or by mistake, or that they were unjustly enriched at the plaintiff's expense. Rather, the Complaint alleges breach of contract by the CUM de-

defendants and seeks either return of the T.M. assets or in lieu thereof damages in the amount of \$2 million.

Plaintiff apparently contends that a purchaser for value of certain assets of a corporation who takes with notice of any claim against the corporation acquires at best a voidable title as to those assets. Plaintiff has not cited any support for this untenable proposition, nor could he. Nothing in Restatement of the Law of Restitution suggests that notice of a mere claim destroys the status of a *bona fide* purchaser; on the contrary, there must be "*notice of the facts* giving rise to a constructive trust of the property." Restatement of the Law of Restitution, §175(1) (emphasis added). The only fact which the plaintiff in his Complaint herein alleged the Hudson Bay defendants had notice of was the pendency of the 1970 action. Yet notice of the pendency of an action seeking restitution of corporate stock is not notice of facts giving rise to a constructive trust of corporate assets, nor does it destroy the status of a *bona fide* purchaser. Cf., *Parker v. Conner*, 93 N.Y. 118, 126-28 (1883) (mere negligence in failing to discover fraudulent intent does not destroy the status of a *bona fide* purchaser for value); *Hall v. Bank of Blasdell*, 306 N.Y. 336, 340, 118 N.E.2d 464, 467 (1954) ("existence of merely suspicious circumstances does not, without more, amount to notice of an infirmity or defect"); *Trade Development Bank v. Cal-Tech Systems*, 20 App. Div. 2d 355, 358, 247 N.Y.S.2d 252, 255 (1st Dept.), *aff'd* 14 N.Y.2d 909, 200 N.E.2d 859 (1964) (existence of litigation challenging validity of corporate notes is "no more than suspicious circumstances as distinguished from facts that brought home to [transferee] either knowledge or a duty to make further inquiry"); *Kuhlman v. Pacific States Saving. & Loan Co.*, 17 Cal.2d 820, 112

P.2d 620, 621 (Cal. 1941) ("the fact that [transferee] knew of the [plaintiff's] claim to certain personal property and assisted in resisting that claim is not a ground for subjecting the property received by it to the judgment thereafter rendered.").*

III

Even if notice of the pendency of the 1970 complaint amounts to notice of facts giving rise to a constructive trust, the constructive trust extends only to the T.M. stock and not the T.M. assets.

As noted above, Darin's 1970 complaint sought restitution of the T.M. stock he had transferred to the CUM defendants. The 1970 complaint did not seek restitution of the specific T.M. assets which were acquired by Hudson Bay, nor did it even seek any preliminary or injunctive relief barring the sale of those assets. Even if notice of pendency of the 1970 complaint seeking restitution of T.M. stock was notice of facts giving rise to a constructive trust with respect to the T.M. stock, that trust did not extend to the T.M. assets which were acquired by Hudson Bay.

It is well-settled that a "corporation in respect of corporate property and rights is entirely distinct from the stockholders who are the ultimate or equitable owners of its assets; that even complete ownership of capital stock

* Plaintiff's claim that the fact that the Hudson Bay defendants obtained an indemnification agreement from the CUM defendants at the time of the sale of the assets somehow deprived the Hudson Bay defendants of their status as *bona fide* purchasers is without merit. A purchaser's insistence on this kind of protection is not in the least unusual and in any event is irrelevant to the issue of the Hudson Bay defendants' "good faith" status herein.

does not operate to transfer the title to corporate property; and that ownership of capital stock is by no means identical with or equivalent to ownership of corporate property." *Brock v. Poor*, 216 N.Y. 387, 401, 111 N.E. 229, 234 (1915); *Torrey Delivery, Inc. v. Chautauqua Truck Sales and Service, Inc.*, 47 App. Div.2d 279, 366 N.Y.S.2d 506, 510 (4th Dept. 1975). Thus an action demanding issuance of corporate stock against a corporation which owns real property is not an action affecting the title to, or the possession, use or enjoyment of realty, authorizing the filing of a *lis pendens* under New York law. *Whittemore v. DePasquale*, 8 App. Div. 2d 793, 187 N.Y.S.2d 53 (1st Dept. 1959). See, *Carlino v. Fulcrum Corp.*, 29 App. Div.2d 533, 285 N.Y.S.2d 975 (1st Dept. 1967).

It necessarily follows, that even assuming that plaintiff was the beneficiary of a constructive trust of the TM stock arising out of the facts alleged in the 1970 complaint, such a constructive trust would by no means extend to the TM assets acquired by the Hudson Bay defendants for value with notice of the 1970 complaint.* The logic of this con-

* For the same reason, New York's common law *lis pendens* doctrine, cited at page 29 of the plaintiff's brief, has absolutely no application to the instant case. Actual or constructive knowledge of litigation wherein the ownership of corporate stock is at issue, can in no way affect the title of one who purchases the corporation's assets for value with notice of the pending action. If, as the plaintiff would appear to have it, the converse were true, the mere filing of a complaint contesting the ownership of a corporation's stock would have the effect of jeopardizing the title of a purchaser for value of any of the corporation's assets. Moreover, the doctrine of notice of pendency has not been applied in New York to property which is not specified in the complaint. *Leitch v. Wells*, 48 N.Y. 585 (1872); *Weisinger v. Berfond*, 193 N.Y.S.2d 417, 419 (Sup. Ct., Kings Co., 1959) ("The doctrine of *lis pendens* affects only the land or property described in the pleadings and cannot affect other property of the defendants.").

clusion is inescapable. The contract between Darin and the CUM defendants which is the subject of this litigation was a contract for the exchange of corporate stock. Darin's 1970 complaint merely sought damages and restitution of the stock he had transferred. Merely because the Hudson Bay defendants, with knowledge of the 1970 complaint, exchanged valuable consideration for T.M. assets, they cannot now be charged with any wrongdoing for failing to anticipate that the plaintiff would later change his complaint to seek restitution of the T.M. assets instead of the stock. Absent any claim that the acquisition of T.M. assets by the Hudson Bay defendants was not for a fair and valuable consideration, the plaintiff has no grounds to claim that he was injured by the transaction or to assert a right of rescission and restitution against the Hudson Bay defendants.

Conclusion

1. For the reasons as set forth in the brief of the defendants-appellees CUC and CUM submitted herein, the Final Order and Judgment of the District Court dismissing with prejudice the Second Amended Unified Complaint and striking certain material from the Amended Unified Complaint should be affirmed in all respects.

2. Assuming *arguendo* the defendants-appellees CUC and CUM are not entitled to a dismissal of the Second Amended Unified Complaint as to them, so much of the Final Order and Judgment of the District Court as dismissed said Complaint as to the Hudson Bay defendants on the grounds that the Complaint failed to allege any

facts entitling plaintiff to the equitable relief demanded against said Hudson Bay defendants, should be affirmed.

Respectfully submitted,

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Service of 2 copies of the
within Brief is hereby
admitted this 1st day of

July 1976

Signed _____

Attorney for Plaintiff-Appellant

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